STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 5, 2014
v	No. 308922 Wayne Circuit Court
JEFFREY LAKIETH DAVIS, Defendant-Appellant.	LC No. 11-004851-FC

Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

Defendant appeals as on leave granted[1] the guilty plea conviction of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) (sexual penetration with a child under 13 years of age), for which he was sentenced to 30 to 50 years' imprisonment. We vacate defendant's sentence and remand for further proceedings consistent with this opinion.

Defendant contends – and the prosecution agrees – that his plea was involuntary because he was misled regarding the actual value of the plea agreement due to representations made by the prosecution and trial court that the minimum sentence would not exceed the mandatory minimum of 25 years. We likewise agree.

After a guilty plea has been accepted, there is no absolute right to withdraw the plea. *People v Harris*, 224 Mich App 130, 131; 568 NW2d 149 (1997). "When a motion to withdraw a plea is made after sentencing, the decision whether to grant it rests within the discretion of the trial court." *People v Haynes (After Remand)*, 221 Mich App 551, 558; 562 NW2d 241 (1997). That decision will not be disturbed on appeal unless there is a clear abuse of discretion resulting in a miscarriage of justice. *People v Eloby (After Remand)*, 215 Mich App 472, 475; 547 NW2d 48 (1996).

MCR 6.310(C) governs plea withdrawals after sentencing, and provides:

[1] *People v Davis*, 493 Mich 873; 821 NW2d 573 (2012).

> Motion to Withdraw Plea After Sentence. The defendant may file a motion to withdraw the plea within 6 months after sentence. Thereafter, the defendant may seek relief only in accordance with the procedure set forth in subchapter 6.500. *If the trial court determines that there was an error in the plea proceeding that would entitle the defendant to have the plea set aside, the court must give the advice or make the inquiries necessary to rectify the error and then give the defendant the opportunity to elect to allow the plea and sentence to stand or to withdraw the plea.* If the defendant elects to allow the plea and sentence to stand, the additional advice given and inquiries made become part of the plea proceeding for the purposes of further proceedings, including appeals. [Emphasis added.]

"A defendant seeking to withdraw his or her plea after sentencing must demonstrate a defect in the plea-taking process." *People v Brown*, 492 Mich 684, 693; 822 NW2d 208 (2012). A defendant pleading guilty must enter an understanding, voluntary, and accurate plea. MCR 6.302(A). The plea is voluntary if the terms of the plea agreement are disclosed and the plea is the defendant's own choice. MCR 6.302(C). "Where a defendant's plea of guilty is induced by the prosecutor's promise relating to sentencing, the terms of that agreement must be fulfilled." *People v Swirles*, 206 Mich App 416, 418-419; 522 NW2d 665 (1994). Under MCR 6.302(C)(1), the agreement must be stated on the record or reduced to writing and signed by the parties. "If there is a plea agreement and its terms provide for the defendant's plea to be made in exchange for a sentence to a specified term or within a specified range, or a prosecutorial sentence recommendation," the trial court has the option to reject the agreement, accept the agreement, or take the agreement under advisement. MCR 6.302(C)(3). "If the court accepts the agreement without having considered the presentence report or takes the plea agreement under advisement, it must explain to the defendant that the court is not bound to follow an agreement to a sentence for a specified term or within a specified range or a recommendation agreed to by the prosecutor, and that if the court chooses not to follow an agreement to a sentence for a specified term or within a specified range, the defendant will be allowed to withdraw from the plea agreement." *Id.*; *People v Killebrew*, 416 Mich 189, 206–207; 330 NW2d 834 (1982).

At the plea hearing, the following colloquy occurred:

> *MS. GLENN:* The People agree to dismiss Count II, in exchange for a guilty plea to Count I. *We agree to a guidelines sentence. This is a mandatory minimum of twenty-five years. There are no other conditions or agreements in this matter*.
>
> *THE COURT:* Have you computed the guidelines yet?
>
> *MS. GLENN:* Your Honor, I have them from Pretrial Services preliminarily at 135 months, to 225 months. I did look over them, and they appear to be correct.
>
> *THE COURT: There has to be a minimum of twenty-five years?*
>
> *MS. GLENN: That's correct*, Your Honor. [Emphases added.]

The trial court then asked defendant if he understood he was being charged with first-degree CSC, and "[t]here is a mandatory minimum of twenty-five years, along with electronic monitoring, and you'll do that as well." Defendant replied, "Yes." At sentencing, the following dialogue took place on the record:

> *MR. SIMMONS:* We've review the probation report. It's factually correct, Your Honor. There isn't much discretion available in this matter.
>
> *THE COURT: There's an agreement by the People for a guidelines sentence*.
>
> *MR. SIMMONS:* Your Honor, *except the guidelines are not applicable* in this case.
>
> *THE COURT:* It's a minimum twenty-five years.
>
> *MR. SIMMONS:* That's correct, Judge. [Emphases added.]

The trial court then sentenced defendant to 30 to 50 years' imprisonment.

It is not entirely clear from the record whether the prosecutor agreed to recommend that defendant's minimum sentence fall within the guidelines, whether he agreed to the mandatory minimum sentence of 25 years, or whether there was no agreement at all with respect to sentencing. However, that is of no import because the prosecution agrees with defendant that certain statements by the prosecutor as to the 25-year minimum sentence could have led defendant to reasonably believe that the sentence agreement was to 25 years. And, the record supports that conclusion because it was repeatedly stated at the plea hearing that the conviction carried with it a mandatory minimum of 25 years under MCL 750.520b(2)(b).[2] Thus, any agreement to a guidelines sentence below the 25-year mandatory minimum would be contrary to MCL 750.520b(2)(b). Under this scenario, because defendant's plea was made in exchange for a sentence to a specified term, the trial court failed to comport with the plea requirements as required by MCR 6.302(C), by not allowing defendant the opportunity to withdraw the guilty plea when the trial court sentenced defendant to a minimum sentence above 25 years. *Killebrew*, 416 Mich at 209-210. The trial court abused its discretion in denying defendant's motion to withdraw, which resulted in a miscarriage of justice.

"Depending on the circumstances of the case, the remedy for failure to fulfill the agreement may be plea withdrawal, or it may be specific performance." *People v Siebert*, 201 Mich App 402, 427; 507 NW2d 211 (1993), citing *Santobello v New York*, 404 US 257, 263; 92 S Ct 495; 30 L Ed 2d 427 (1971). Normally, the choice of remedy is within the trial court's discretion, though a defendant's preference should be accorded considerable weight. *Id.* Here,

[2] "For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years."

all parties concede that because the record is unclear whether there was a sentencing agreement, the record caused defendant to reasonably believe that he would not receive higher than a 25-year minimum sentence. As a result, both the prosecution and defendant's appellate counsel also agree that defendant is entitled to specific performance of a plea agreement with a 25-year minimum sentence. Given that both parties agree to specific performance of a plea agreement for a 25-year minimum sentence, we remand the matter to the trial court, and direct the court to impose a sentence of 25 to 50 years' imprisonment for the first-degree CSC conviction.[3]

As a result of our holding that defendant is entitled to specific performance of a sentence of 25 to 50 years' imprisonment, we need not address his alternative claims for ineffective assistance of counsel and the trial court's failure to state substantial and compelling reasons for its upward departure from the mandatory minimum sentence.

We vacate defendant's sentence and remand to the trial court to impose a sentence of 25 to 50 years' imprisonment for defendant's first-degree CSC conviction, MCL 750.520b(1)(a). We do not retain jurisdiction.

/s/ Christopher M. Murray
/s/ Kathleen Jansen
/s/ Douglas B. Shapiro

[3] We reject defendant's argument that the plea bargain was illusory and promises of leniency were made. Despite defendant's contention that he was overcharged and he misapprehended the value of the plea bargain, he cannot challenge the state's ability to prove factual guilt regarding the two counts of first-degree CSC. *People v Johnson*, 207 Mich App 263, 264-265; 523 NW2d 655 (1994). Moreover, the bargain on which defendant's guilty plea was based was not illusory because if he was convicted of both counts of first-degree CSC, he could have been ordered to serve the sentences consecutively. MCL 750.520b(3); *People v Ryan*, 295 Mich App 388, 406; 819 NW2d 55 (2012). With respect to defendant's claim that there were promises of leniency, this Court generally rejects assertions that promises of leniency were made where the defendant has sworn on the record that no such promises were made, as was the case here. *Haynes*, 221 Mich App at 562.